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No. 93-644

In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OREGON

Brief of the States of Hawaii, Kansas, Minnesota, Mississippi, Montana, and Oregon as Amici Curiae Supporting Respondent

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QUESTION PRESENTED

Whether a State's decision to provide limited judicial review of a jury's punitive damages award violates the Due Process Clause.

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INTEREST OF AMICI CURIAE

Oregon and the other amici States provide either by statute or case law for the recovery of punitive damages. They also provide procedural protections to ensure that punitive damages are assessed fairly. Many States have passed legislation to further that goal. They have capped punitive damages awards, provided for bifurcated trials, established criteria that limit a jury's discretion to award punitive damages, or required heightened standards of proof. The States in short have exercised their judgment in determining the procedures that best advance their

interests, consistent with the underlying due process requirement that those procedures be fair.

For its part, Oregon channels the jury's discretion to award punitive damages by providing that any award be based on specific statutory criteria and by imposing a heightened burden of proof, clear and convincing evidence. An Oregon court, however, may not re-examine the damages the jury awarded to determine if, in the court's view, the award is excessive. The Oregon Constitution prohibits state courts from engaging in this form of judicial review, a limitation that defendants claim denies them due process.

Oregon's interest in this case arises out of defendants' challenge to its constitutional provision protecting the integrity of jury verdicts. The provision was adopted more than 80 years ago. It applies generally to all jury verdicts, and it reflects the same values as the Seventh Amendment. Beyond this specific interest, Oregon and the other amici States share a broader concern. Defendants seek to limit the latitude traditionally accorded States to choose among fair procedures. They advance a notion of due process that, if accepted, would vest the federal courts with oversight authority to specify the procedures States must employ in their jury trials. The amici States have an interest in ensuring that they remain free to choose, consistent with principles of federalism, the procedures that will govern the relationship between judges and juries within their own jurisdictions.

SUMMARY OF ARGUMENT

This case turns on the degree to which the Constitution authorizes federal courts to oversee the procedures States employ in their jury trials. Defendants view the Due Process Clause as if it contained a template that every State's procedures must match. The Due Process Clause is not that restrictive, however.

It requires that States provide fair procedures but leaves the States latitude to decide which procedures or combination of procedures will ensure that juries assess punitive damages fairly.

Oregon limits the jury's discretion by directing it to base any award of punitive damages on specific statutory criteria and by requiring plaintiffs to meet a heightened burden of proof. That is sufficient. Procedural due process does not also require that Oregon courts review the jury's verdict to determine if it is excessive. Oregon's decision to provide limited judicial review reflects its respect for the integrity of jury verdicts, a decision that is consistent with the values reflected in the Seventh Amendment. States may provide different procedures to channel the jury's discretion, including more extensive review than Oregon courts undertake. But due process does not require that all States employ the same procedure.

ARGUMENT

Defendants' argument is limited. They do not argue that the damages awarded in this case are "so 'grossly excessive' as to violate the substantive component of the Due Process Clause," *TXO Production v. Alliance Resources*, 113 S. Ct. 2711, 2720 (1993) (plurality). Rather, they argue that procedural due process requires States to engage in judicial review to determine if damages awards are excessive as a matter of state law. Defendants and their amici take an unduly rigorous view of what due process entails. In no other area of the law has the Court suggested, much less held, that due process requires the sort of judicial review defendants propose. Indeed, if defendants' arguments were accepted, the Due Process Clause would require greater procedural protection when a jury awards punitive damages than when it imposes the death penalty. Nothing in

either the Court's decisions or a concern for due process supports that result.

Defendants' analysis goes astray in three respects. First, defendants focus their argument too narrowly. They ask whether a particular procedure is necessary without considering whether the other procedures a State provides ensure that any punitive damages award will be fair. Second, defendants undervalue Oregon's interest in the integrity of jury verdicts and overvalue the utility of "excessiveness" review. To the extent defendants' position results from their view of the common law, the common-law traditions in this area are more divergent than defendants' brief recognizes. *See Galloway v. United States*, 319 U.S. 372, 391–95 (1943). Third, defendants' arguments fail to recognize the principle that has guided the Court's due process analysis since *Spencer v. Texas*, 385 U.S. 554 (1967), and *McGautha v. California*, 402 U.S. 183 (1971). The Due Process Clause "requires that trials be fairly conducted," but it leaves the States latitude in deciding which procedures meet that standard. *McGautha v. California*, 402 U.S., at 220–21.

A. Oregon's Procedural Protections.

Oregon provides for limited judicial review of a jury's verdict. Oregon courts will inquire whether the evidence in record and any reasonable inferences that may be drawn from it support the verdict. *Schockey v. City of Portland*, 313 Or. 414, 422–23, 837 P.2d 505 (1992); *Foster v. Schnell Refrigeration Co.*, 280 Or. 411, 414, 571 P.2d 497 (1977). Oregon courts do not, however, second-guess the jury's verdict by trying to determine whether the verdict is against the weight of the evidence, nor do they undertake to determine whether the damages awarded are excessive. *Von Lom v. Schneiderman*, 187 Or. 89, 99, 210 P.2d 461 (1949). The respect for the integrity of

the jury's verdict, which is embodied in the Oregon Constitution, precludes the state courts from second-guessing the jury's factual findings. *See* Or. Const. Art. VII (Amended), § 3; *Von Lom v. Schneiderman*, 187 Or., at 99.[1]

Defendants focus on one procedure, which they term "excessiveness" review. They argue that Oregon's decision not to engage in "excessiveness" review denies them due process because the jury is left free to base its decision on bias or prejudice rather than the evidence. Defendants employ the wrong methodology, however. The Court has never held that post-verdict review for excessiveness is a necessary component of due process. *See Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1 (1991).[2] Nor has it looked solely at one part of the process a State provides to determine whether the State's procedures sufficiently limit the jury's discretion. *Id.*, at 18, 23 n. 11 (looking at cumulative effect of a State's procedures). Rather, it has based that determination on all the procedural protections that channel the jury's decision. *Ibid.*

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[1] Article VII (Amended), section 3, of the Oregon Constitution provides in part:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

[2] The Court recognized in *Haslip* that some procedure was necessary to counterbalance the discretion to impose punitive damages that Alabama juries were given. It concluded that the extensive post-verdict review the Alabama appellate courts undertook provided "a sufficiently definite and meaningful constraint on the discretion [allowed] Alabama factfinders in awarding punitive damages." 499 U.S., at 22. The Court did not hold that any other check would have been constitutionally insufficient.

The proposition is not a novel one. In death penalty cases, the Eighth Amendment requires that the jury not be allowed to exercise unfettered sentencing discretion.[3] *Furman v. Georgia*, 408 U.S. 238 (1972). No one procedure, however, is essential to channel or guide the jury's discretion. *Pulley v. Harris*, 465 U.S. 37, 42–46 (1984); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality). Rather, different procedures or combinations of procedures will suffice. *Ibid.* Indeed, the Court expressly rejected the notion that the sort of judicial review the Alabama Supreme Court provided in *Haslip* is necessary to limit the jury's sentencing discretion in death penalty cases. *Pulley v. Harris*, 465 U.S., at 450–51. It follows that the question in this case is not whether one procedure is absent but whether the cumulative procedures a State provides are sufficient to guide the jury's determination.

In punitive damages cases, Oregon provides a combination of procedures to ensure that any award of damages is not the product of bias or prejudice. The initial protection is voir dire. Both parties are permitted to engage in extensive questioning to identify prospective jurors whose bias would prevent them from deciding the case fairly. Or. R. Civ. P. 57C. Biased jurors may be excused for cause. Or. R. Civ. P. 57D(1); *see State v. Montez*, 309 Or. 564, 574–75, 789 P.2d 1352 (1990) (applying rule). Each party also has peremptory challenges that may be used to excuse jurors who are not biased but who, for one reason

[3] Due process, not the Eighth Amendment, applies to a punitive damages award in a civil case between private parties. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). This brief discusses the Eighth Amendment requirements in death penalty cases only by way of comparison. It should be noted, however, that in death penalty cases, due process is less demanding than the Eighth Amendment. Giving the jury unfettered sentencing discretion in death penalty cases does not violate due process, *McGautha v. California*, 402 U.S., at 220–21, although it would violate the Eighth Amendment, *Furman v. Georgia*, *supra*.

or another, appear antagonistic to that party's case. Or. R. Civ. P. 57D(2).

A second protection is available to ensure that the jury's verdict will be based rationally on the evidence. Although counsel are allowed some latitude in argument, they may not engage in an argument that "ha[s] a tendency to excite the hostility of the jury against the opposing party." *Shaw v. Pacific Supply Coop.*, 166 Or. 508, 513, 113 P2d 627 (1941); *State of Oregon v. Montgomery Ward Development Corp.*, 79 Or. App. 457, 470, 719 P.2d 507, *review denied*, 301 Or. 667 (1986). The Oregon courts have made clear that, given a timely objection, trial courts should take whatever steps are necessary to cure appeals to jury prejudice or bias. *Ibid.* Oregon thus provides the parties with the means to ensure both that the jury is neutral and that the arguments presented are not aimed at inciting the jury.[4]

When a punitive damages case is submitted to the jury, Oregon provides two further protections. In products liability cases, such as this one, Oregon limits the jury's discretion by articulating criteria that both inform and limit its decision. *See* Or. Rev. Stat. § 30.925. The jury must find, as a threshold matter, that the defendant "has shown wanton disregard for the health, safety, and welfare of others." Or. Rev. Stat. § 30.925(1). If it crosses that threshold, then its decision to assess punitive damages "shall be determined and . . . based upon" the following criteria: (1) the likelihood that serious harm

[4] Although defendants speculate about possible jury bias against foreign or rich defendants, they have not claimed that their ability to detect such bias was unfairly limited during voir dire. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 309–12 & n. 30 (1987) (statistical proof of general bias insufficient to invalidate specific verdict). Nor have they claimed that any argument plaintiffs made justified a mistrial or should have been cured by an appropriate instruction.

would result from the defendant's misconduct; (2) the degree to which the defendant was aware of that likelihood; (3) the profitability of defendant's misconduct; (4) the duration of the misconduct and any concealment of it; (5) the attitude and conduct of the defendant upon discovery of the misconduct; (6) the financial condition of the defendant; and (7) the "total deterrent effect" of other punishment imposed on the defendant as a result of the misconduct, including other punitive damages awards or criminal sanctions. Or. Rev. Stat. § 30.925(3)(a)–(g).

These criteria are virtually identical to the criteria the Alabama Supreme Court applied in its post-verdict review, which the Court held were constitutionally sufficient. *Compare* Or. Rev. Stat. § 30.925(3)(a)–(g), *with Pacific Mutual Life Insurance v. Haslip*, 499 U.S. at 21–22.[5] Although the criteria are essentially the same, they are introduced at different stages of the proceedings. Oregon courts instruct the jury to apply these criteria in determining the amount, if any, of punitive damages that should be awarded but do not review the jury's award for "excessiveness." Alabama conversely gives the jury substantial discretion in awarding punitive damages but reviews the jury award to determine, after the fact, whether it is consistent with the criteria.

If applying these criteria in post-verdict review provides a constitutionally sufficient constraint on the jury's discretion, as the Court held in *Haslip*, instructing the jury to apply them in

[5] The Court noted in *Haslip* that the Alabama courts considered (1) whether there is a reasonable relationship between the punitive damages awarded and the harm either actually done or likely to result from the defendant's conduct; (2) the degree of reprehensability of the defendant's conduct, its duration and degree of repetition, defendant's awareness of it, and any attempts to conceal it; (3) the profitability or expected profits from the conduct; (4) the defendant's financial position; (5) the costs of litigation; (6) imposition of criminal sanctions; and (7) the existence of other civil awards against the defendant. 499 U.S., at 21–22.

reaching its verdict is also constitutionally sufficient, if not preferable. Post-verdict review is necessarily speculative. A court must reason backwards from an unexplained verdict to divine whether the jury applied the correct standards. The inquiry is fraught with difficulties, a point the various opinions in this area have recognized. *See Pacific Mutual Life Insurance v. Haslip*, 499 U.S., at 18 (no mathematical line can be drawn distinguishing permissible from impermissible awards); *id.* at 37 (Scalia, J., concurring in the judgment); *TXO Production v. Alliance Resources*, 113 S. Ct., at 2720 (plurality) (plurality "skeptical" whether objective factors can be applied in a principled fashion); *id.*, at 2729 (O'Connor, J., dissenting) (recognizing inquiry is "no easy matter").

When, as in this case, the jury is instructed to apply the correct standards initially, post-hoc review for "excessiveness" becomes unnecessary.[6] As the Court repeatedly has recognized, juries are presumed to follow their instructions, and the only question is whether the jury was instructed properly. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 206 (1988); *Francis v. Franklin*, 471 U.S. 307, 325 n. 9 (1985); *Marshall v. Lonberger*, 459 U.S. 422, 438–39 n. 6 (1983). Certainly, as between post-hoc review of an unexplained verdict and directing the jury to follow instructions that focus and channel its discretion, the latter course would appear to lead to more consistent and rational jury awards.

Defendants advance two reasons why this limitation on the jury's discretion is, in their view, insufficient. Their initial argument is that juries cannot be trusted either to understand or

[6] It is worth repeating that although review for "excessiveness" of the award is not available in Oregon, both the trial court and the appellate courts may test any award to ensure that the evidence supports the jury's verdict.

to follow their instructions. (Pet. Br. at 31–32). Not only is defendants' view apparently inconsistent with the position they took below,[7] but as noted above it is contrary to a long line of this Court's cases. The Court has repeatedly recognized that juries can and will follow their instructions even when, for example, the instructions call on them to engage in particularly difficult deliberative tasks, *e.g.*, to consider prejudicial evidence for one purpose but not another. *See, e.g., Spencer v. Texas*, 385 U.S., at 567–68; *McGautha v. California*, 402 U.S., at 220–21; *Marshall v. Lonberger*, 459 U.S., at 438–39 n. 6. If juries can follow the court's instructions not to consider evidence of a defendant's past convictions in deciding whether he or she is guilty of the present crime, *see ibid.*, they are also capable of applying Oregon's statutory criteria in determining what amount of punitive damages, if any, should be assessed.

Defendants advance an additional concern. They say that the "instructions actually given" were insufficient. (Pet. Br. 32–33). It is unclear whether defendants are quarrelling with the specific instructions the trial court gave in this case or arguing that sufficient instructions can never be given. If defendants are advancing the former proposition, it is a case-specific dispute that they apparently gave up below.[8] To the extent they are arguing that multi-factor approaches are inherently insufficient, the Court has not accepted that claim in other contexts. For example, in the death penalty cases, the Court initially recognized that requiring juries to weigh aggravating factors against mitigating factors

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[7] The Oregon Supreme Court noted that "[d]efendants do not claim that the trial court failed to instruct the jury concerning the statutory criteria or that the jury did not properly apply those criteria." *Oberg v. Honda Motor Co.*, 316 Or. 263, 282 n. 11, 851 P.2d 1084 (1993).

[8] *See* note 7 *supra*.

sufficiently channels jury discretion under a more demanding Eighth Amendment standard. *See Gregg v. Georgia*, 428 U.S., at 193–95; *Proffitt v. Florida*, 428 U.S. 242, 257–58 (1976) (directing jury to weigh statutorily defined aggravating and mitigating factors sufficiently limited their sentencing discretion).[9] If instructing the jury in a death penalty case to base its sentence on statutorily defined aggravating and mitigating circumstances sufficiently limits the jury's discretion, so does instructing the jury to base any punitive damages award on the criteria set out in the Oregon statutes. *Pulley v. Harris*, 465 U.S., at 44–51.

Oregon also provides an additional procedural protection in punitive damages cases in the form of a heightened burden of proof. Under Oregon law, "a claim for punitive damages shall be established by clear and convincing evidence." Or. Rev. Stat. § 41.315(1). Due process does not require that punitive damages be proved by anything more than a preponderance of the evidence. *Pacific Mutual Life Insurance v. Haslip*, 499 U.S., at 23 n. 11. As the Court recognized in *Haslip*, however, that "[t]here is much to be said in favor of a State's requiring . . . a standard of 'clear and convincing evidence'. . . ." *Ibid.* Oregon requires that standard of proof, thus minimizing the possibility that a jury will impose an unwarranted punitive damages award.

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[9] The Court later made clear that the Eighth Amendment does not require States to direct the jury to weigh aggravating and mitigating circumstances. *See Zant v. Stephens*, 462 U.S. 862 (1983). It requires only that States narrow the class of persons on whom the death penalty may be imposed. *Id.*, at 867. Even then, the Eighth Amendment imposes greater constraints on the jury's exercise of discretion in death penalty cases than the Due Process Clause. *See McGautha v. California*, 402 U.S., at 220–21 (due process does not prohibit jurors from being given unfettered discretion in death penalty cases).

In short, because defendants focus too narrowly on the absence of "excessiveness" review in Oregon, they fail to recognize that that review would be constitutionally redundant in light of the other protections Oregon provides.

B. Excessiveness Review.

Even if the absence of "excessiveness" review were the appropriate focus, defendants' argument is still troubling. It undervalues the State's interest in jury verdicts and overvalues the degree to which "excessiveness" review would advance the fairness of the jury's determination.

Oregon's interest is clear. Article VII (Amended), section 3, of the Oregon Constitution protects the integrity of jury verdicts. It prohibits state courts from re-examining facts found by the jury except to determine whether the verdict is supported by the evidence. The value Oregon places on jury verdicts is not unique. The Seventh Amendment protects the same values, and in almost identical terms. The Seventh Amendment provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[10] The only difference between the state and federal constitutional provisions is that the federal provision has a broader exception than the state. It permits the federal courts to re-examine the jury's factual findings "according to the rules of the common law." It would, for example, permit remittitur when the state constitution would not. *Compare Dimick v. Schiedt*, 293 U.S. 474, 484–85 (1935) (remittitur permissible under the Seventh Amendment), *with Oberg v. Honda Motor Co.*, 316 Or.,

[10] The Oregon Constitution provides: "no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Art. VII (Amended), § 3.

at 275 n. 7 (re-examining jury's award of punitive damages impermissible under Art. VII (Amended), § 3).

Although the Seventh Amendment permits federal courts to determine whether a damages award is excessive, it does not follow that the Due Process Clause requires state courts to do so. To the contrary, it would seem somewhat odd for due process to require States to do what the Seventh Amendment merely permits. Defendants, however, claim that the common law embodies the conclusion that "excessiveness" review is necessary to prevent the jury from basing its verdicts on passion or prejudice. It follows, they conclude, that Oregon's departure from the common law is both "aberrant" and unconstitutional.

Part of the difficulty with defendants' argument is that the relationship between the judge and the jury at common law varied widely. As this Court has explained, when the Seventh Amendment was adopted, "'the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, [were not] crystallized in a fixed and immutable system." *Galloway v. United States*, 319 U.S. 372, 391 (1943); *see* Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291 (1966).[11] Rather, those rules were "constantly changing and developing" "result[ing] in widely divergent common-law rules on procedural matters among the

[11] When the Seventh Amendment was adopted, no "implicit understanding as to th[e] relationship [between judge and jury can] be presumed, for among the thirteen original states there were at least half a dozen widely differing patterns of civil practice. . . ." Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV., at 291.

states, and between them and England." *Galloway v. United States*, 319 U.S., at 391-92.[12]

The Seventh Amendment thus does not embody any particular incident of the common law practice. *Colgrove v. Battin*, 413 U.S. 149, 155-57 (1973); *Galloway v. United States*, 319 U.S., at 394-95. It does not restrict the federal government to a particular number of jurors or to a particular relationship between the judge and the jury. *Ibid.* If the Seventh Amendment gives Congress and the federal courts some leeway to decide what mode of judicial review is appropriate, there is no reason to suppose that the Due Process Clause imposes a more stringent limitation on the States. Rather, like the Seventh Amendment, the Due Process Clause leaves the States free, consistent with the historical value placed on jury verdicts, to conclude that re-examination of the jury's verdict should be limited.

Not only is Oregon's decision to limit judicial review of jury verdicts consistent with long held and widely shared values, but the review defendants claim is constitutionally required seems singularly unhelpful. As discussed above, the procedure defendants advocate — reasoning backwards from an unexplained verdict to determine whether the jury's damages award was based on permissible or impermissible factors — is an imprecise science at best. It fails to provide any sure protection to defendants, and

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[12] In *Galloway*, the Court considered whether the Seventh Amendment, which permits federal courts to re-examine the jury's factual findings "according to the rules of the common law," allowed them to direct jury verdicts in civil cases. It concluded that the common-law rules were sufficiently varied and changing that the constitutional phrase was not intended to embody any particular incident of the common-law practice. The same point applies equally here, even though some common-law courts allowed new trials when the verdict was against the weight of the evidence. *See* Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV., at 318-20 (summarizing practice in the colonies).

it enmeshes the courts in an inquiry that lacks any principled guidelines.

The review defendants seek also duplicates in substantial part a protection they already apparently enjoy. To explain why that is so, it is necessary to discuss briefly the opinions in *TXO Production v. Alliance Resources*, *supra*, and the narrow issue defendants have raised. A majority of the Court agreed in *TXO* that the Due Process Clause imposes a substantive limit on punitive damages awards, although they disagreed on precisely what that limit was. *See TXO Production v. Alliance Resources*, 113 S. Ct., at 2720 (plurality) (considering whether award was "so 'grossly excessive' as to violate the substantive component of the Due Process Clause"); *id.*, at 2731 (O'Connor, J., dissenting) (noting "common ground [between the plurality and the dissent] than an award may be so excessive as to violate due process"). If *TXO* requires, as a matter of substantive due process, that punitive damages awards not be "grossly excessive," Oregon courts will be required to make that substantive federal inquiry in future cases, if and when the claim is made that a particular award exceeds that limit. *See Felder v. Casey*, 487 U.S. 131 (1988); *Rogers v. Saylor*, 306 Or. 257, 760 P.2d 232 (1988).

In this case, defendants have not argued that the award at issue here is so excessive that it violates substantive due process. They made that point clear in their reply to plaintiff's brief in opposition to the petition for certiorari. They explained: "Honda is not pressing a substantive due process argument in this Court; rather, the contention is that the denial of any excessiveness review in the Oregon courts deprived Honda of *procedural* protections to which it is entitled." (Reply Br. at 2) (emphasis in original). Defendants apparently take the view that procedural due process requires state courts to determine if a punitive

damages award is "excessive" as a matter of state law, separately from the determination whether it is excessive as a matter of federal law.

The inquiry defendants seek to impose on state courts does not advance any cognizable federal interest. If *TXO* already requires state courts to decide whether a punitive damages award is so excessive that it violates substantive due process, there is no point in requiring them to make a comparable determination as a matter of state law. To the extent the state and federal "excessiveness" inquiries are identical, *see TXO Production v. Alliance Resources*, 113 S. Ct. at 2726 n. 1 (Scalia, J., concurring in the judgment), the state inquiry will add nothing to the analysis. To the extent state law imposes a stricter limit on punitive damages than federal law would, *see id.*, at 2720 n. 24 (plurality),[13] the inquiry defendants would require will result in the States' invalidating punitive damages awards that do not violate substantive federal standards. Defendants would be effectively asking the Court to impose a stricter substantive standard, in the name of procedural protection, than the substantive component of the Due Process Clause requires. That argument impermissibly converts a procedural protection into a substantive one.

C. Deference to State Legislative Judgments.

Defendants' argument suffers from a final flaw. It invites the Court to impose, as a matter of due process, what they contend is a better procedure. The Court, however, has customarily given the States considerable latitude to determine what procedures are appropriate. As Justice Harlan explained in *McGautha v. Califor-*

[13] The plurality in *TXO* recognized that a punitive damages award might be "excessive" in violation of state law but not "so 'grossly excessive'" that it violates substantive due process. *TXO Production v. Alliance Resources*, 113 S.Ct., at 2720 n. 24.

nia, 402 U.S., at 221, due process "requires no more than that trials be fairly conducted . . . ." As long as a State's procedures are fair, due process does not require States to adopt procedures that may provide a "superior means" of dealing with the issue. *Ibid.* In part, that deference results from notions of federalism. In part, it results from the recognition that many of the debates over procedure in fact reflect substantive policy disputes that are more properly left to the legislative branch.

Tort reform is no exception. The debate whether punitive damages should be limited or abolished has been vigorous. State legislatures have responded with both substantive and procedural limitations. Some States have capped punitive damages awards.[14] Others have bifurcated the liability and damages phase of the hearing or required the trial court to assess punitive damages once the jury determines they are appropriate.[15] Still others prohibit evidence of a defendant's financial condition from being introduced until after the jury has determined that the

[14] *See* Ala. Code § 6-11-21 (Supp. 1992); Colo. Rev. Stat. Ann. § 13-21-102(1)(a) (West 1989); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73(1)(a) (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(g) (Supp. 1992); Kan. Stat. Ann. §§ 60-370(e), 60-3402 (Supp. 1992); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1993); Va. Code Ann. §§ 8.01-38.1 (Michie 1992).

[15] *See* Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Ga. Code Ann. § 51-12-5.1(d)(2) (Michie Supp. 1992); Kan. Stat. Ann. §§ 60-3702, 60-3402 (Supp 1992); Minn. Stat. Ann. § 549.20(4) (West Supp. 1993); Mo. Ann. Stat. § 510.263 (West Supp. 1992); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. Ann. § 42.005(3) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); N.J. Rev. Stat. Ann. § 2A:58C-5 (West 1987); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1991).

defendant should be assessed some punitive damages.[16] Some have adopted heightened standards of proof and other procedures.[17]

The point is not that one side or the other has won the day legislatively. Rather, both sides have been able to present their positions in the state legislatures, and courts should be hesitant to override the policy choices that result from that legislative process. As long as a State provides fair procedures — and Oregon does — deference to the legislative judgment embodied in state statutes and constitutional provisions should continue to counsel against engrafting additional procedures on state practice. Defendants' invitation to do so should be declined.

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[16] *See* Cal. Civ. Code Ann. § 3295(d) (West Supp. 1993); Md. Code Ann. § 10-913(a) (1989); Mont. Code Ann. § 27-1-221(7) (1991); Nev. Rev. Stat. § 42.005(4) (Supp. 1991); N.J. Stat. Ann. § 2A:58C-5(a) (West 1987); Or. Rev. Stat. § 30.925(2); Utah Code Ann. § 78-18-1(2) (Michie 1992).

[17] Alaska Stat. § 09.17.020 (1992); Ala. Code § 6-11-20(a) (Supp. 1992); Cal. Civ. Code Ann. § 3294(a) (West Supp. 1993); Colo. Rev. Stat. Ann. § 13-25-127(2) (West 1989); Fla. Stat. Ann. §§ 768.73 - 768.74 (West Supp. 1993); Ga. Code Ann. § 51-12-5.1(b) (Michie 1992); Ind. Stat. Ann. § 34-4-34-2 (Burns 1986); Iowa Code. Ann. § 668A.1 (West 1987); Kan. Stat. Ann. § 60-3701(c) (Supp. 1992); Ky. Rev. Stat. § 411.184(2) (Michie 1992); Minn. Stat. Ann. § 549.20(1) (West Supp. 1993); Mont. Code Ann. § 27-1-22(5) (1991); Nev. Rev. Stat. Ann. § 42.005(1) (Michie Supp. 1991); N.D. Cent. Code § 32-03.2-12 (Supp. 1991); Ohio Rev. Code Ann. § 2315.21(C)(3) (Anderson 1991); 1986 Okla. Sess. Laws 315 § 1; Or. Rev. Stat. § 41.315(1) (1991); S.C. Code Ann. § 15.33-135 Ann. § 78-18-1(1)(a) (Michie 1992).

CONCLUSION

For the reasons stated above, the Oregon Supreme Court's judgment should be affirmed.

Respectfully submitted,

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